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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NUMBER 1112

WILL FOSTER

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Your petitioner, Will Foster, prays that this Court grant rehearing of its order of May 15, 1967, denying the Petition for Writ of Certiorari, _____US_____, and that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above entitled case as prayed for in the petition filed herein March 3, 1967.

REASONS FOR GRANTING REHEARING AND ISSUING A WRIT OF CERTIORARI

1.

Qui statuit aliquid,
parte inaudita altera,
Acequum licet statuerit,
haud aequus
haud aequus fuerit. (a)

The cause of Will Foster was never a proper candidate for a summary judgment. Yet a summary judgment was granted in the instant case, not because of the evidence, but rather in spite of the evidence and in the absence of evidence. The fact that one Justice, the Honorable Hugo Black, dissented in the May 15, 1967 order, indicates that the instant case does not properly meet the test of "not having a scintilla of evidence." Thus the petitioner prays that since one Justice has seen the probability or possibility that the petitioner could establish by further evidence that his plight, working aloft a box of cargo in the hatch square, while cargo was moving overhead, was an unseaworthy condition, the petitioner urges that the summary judgment, herein, should be reversed, affording the petitioner adequate opportunity to present his case.

2.

Justitia suum cuique
distribuit. (b)

The injuries sustained by the petitioner, herein, proximately resulted from an inverse

loading procedure (i.e., first to the square, then the wings) which was designed administratively by shoreside personnel of the shipowner (which shoreside personnel were neither seamen nor longshoremen). And as a victim ensnared in a trap the petitioner had no time to contemplate, as did the seaman of Aho v. Jacobsen, (1959) 359 US 25, 79 S Ct 602, nor did the petitioner, Will Foster, have a choice of ways and means, as did the seaman in Palermo v. Luckenbach Steamship Co., Inc. (1957) 355 US 20, 78 S Ct 1. Yet a summary judgment was rendered against Will Foster. And it is this summary judgment that does violence to the history of jurisprudence on the warranty of seaworthiness.

Herein McAllister v. Magnolia Petroleum Company (1958) 357 US 221, 78 S Ct 1201 has been re-edited so that an unsafe place in the square of the hatch, proximately causing an accident, must be ignored if the ship, and particularly its winches, were in good working order. And while it may be true that the duty or obligation of furnishing a seaworthy vessel may not be otherwise delegated when a ship officer is involved the instant case represents the rule that the duty can be delegated to shoreside and/or administrative personnel when they merely design by cargo plan or loading procedure an unsafe condition. (c) In the lawbooks the case of Italia Societa Per Azioni di Navigazione v. Oregon Stevedoring Co. (1964) 376 US 315, 84 S Ct 748, represents authority for the rule that "a stevedore's implied warranty of workmanlike service is

breached even where the stevedoring personnel non negligently supply defective equipment, causing injury to an employee/longshoreman, but herein the summary judgment against Will Foster represents the rule that the administrative negligence (i. e., a cargo plan or loading plan that designed an accident) would not represent actionable negligence for which Will Foster could seek remedy.

The precarious conditions which forced Will Foster to choose between being crushed or jumping to an injury were conditions within the control of the shipowner, and unlike the vicious propensities of Gonzales [d] in Boudoin v. Lykes Bros. SS. Co., Inc. (1955) 348 US 336, 75 S Ct 382 and unlike the spawn that suddenly deposited on the deck of the vessel in Mitchell v. Trawler Racer, Inc., (1960) 362 US 539, 80 S Ct 926 the instant shipowner had administrative supervision over the office personnel that designed and/or prepared the cargo plan or loading procedure whereby a large box of cargo was first loaded to the hatch square, while other cargo was loaded over and around to the wings.

3.

Nemo se tuto diu
periculis offerre tam
Crebris potest quem saepe
transit casus, aliquqndo
invenit. [e]

To evaluate the instant matter the petitioner referred to the case of Kernan v.

American Dredging Company (1957) 355 US 426, 78 S Ct 394 and also the case of Albanese v. N. V. Nederlandsch Amerikaansche Stoomvaart Maatschappij (1965) 382 US 283, 86 S Ct 429. Armed with these holdings he urged his cause with confidence, as the instant case represents definite violations of the sections 9:32 and 9:34 of the Safety & Health Regulations for Longshoring, Public Law 85-742, 72 Stat 835 (amending 44 Stat 1444, 33 USC 941). However, a summary judgment was granted against the petitioner and in favor of the defendant, thus the apparent rule of the instant case is that violations of sections 9:32 and 9:34 of the said act does not render a vessel unseaworthy. And this is most confusing to the petitioner because the same Fifth Circuit Court of Appeals that has heretofore affirmed the offending summary judgment against the petitioner has contrariwise heretofore held that the violation of Section 9:31 (c) represented an unseaworthy condition. See Maning v. M/V Sea Road, 358 F 2d 615 (5 CA 1965).

4.

Summum jus, summa injuria (f)

In affirming the summary judgment of the Honorable Frank B. Ellis, former judge of Section B, the Fifth Circuit Court of Appeals relied on Admiralty Rule 58, the case of Neal v. Lykes Bros. Steamship Co., Inc. (5 CA - 1962) 306 F 2d 313 and the case of McQuiston v. Freighters and Tankers Steamship Company (5 CA - 1964) 327 F 2d 746.

As previously urged the petitioner re-urges: There is no relationship, whatsoever, between the act of twisting one's back while shoveling grain by hand, as exemplified in the McQuiston case to the mechanics of the instant casualty of Will Foster. And with the longshoreman, Neal, of Neal v. Lykes, the only coincidental relationship of that case with the instant case is that both longshoremen worked for the same New Orleans-domiciled corporation and similarly had appellate review of their cases before the same Fifth Circuit Court of Appeals in New Orleans, Louisiana. Beyond that there is no significant coincidence between Neal and Foster.

Had the Fifth Circuit, while ignoring Supreme Court decisions applicable, (g) sought cases decided in the same Fifth Circuit there were cases at hand more to evaluate the instant facts:

In Mills v. Mitsubishi Shipping Co., 358 F 2d 609, the same Fifth Circuit found as a matter of law, reversing a jury verdict to the contrary, that a shaking brake lever, that never broke, rendered a vessel unseaworthy. Notwithstanding that the Fifth Circuit found the Mitsubishi vessel as a matter of law unseaworthy, in spite of a jury verdict to the contrary, the same Fifth Circuit found as a matter of law, via summary judgment, that there was no actionable negligence or unseaworthiness, herein, with reference to a lack of safety nets on an overhead load of cargo, an inverse loading procedure that placed the

petitioner high atop a small area, without ingress or egress. And to come more pointedly to the problem of "ingress and egress" the same Fifth Circuit could have reviewed its Superior Oil v. Trahan case (1964) 1964 AMC 100 wherein two small boats moored alongside a drilling barge were adjudged to be unseaworthy because these boats were without adequate means of ingress or egress to enable a seaman to make a social call to the outboard vessel.

And decided on April 13, 1967, case number 23273, entitled Robichaux v. Kerr McGee Oil Industries, Inc. by the same Fifth Circuit has this peculiar language:

> "... shipowner owes a non delegable duty to furnish a seaworthy vessel, and this duty extends to the intermediary employees who are performing a portion of the ship's work. Seas Shipping Co. v. Sieracki, 328 US 85.... if there is improper use of seaworthy equipment by intermediary employees, resulting in injury to a worker, his claim might squarely come within the doctrine of Sieracki, supra, depending of course, upon whether the injury came at the very moment of the negligent use, or after the negligence of the fellow worker had come to rest and the equipment had been left in an unsafe condition. See Antoine v. Lake Charles

Stevedores, _____F 2d_____ (5-Cir 1956), decided this day. (h)

The petitioner submits that the spirit, if not the holdings, of Mills, Trahan and Robichaux are adverse to the holding herein granting the summary judgment against Will Foster.

CONCLUSION

The petitioner submits that in the original petition and in this petition for a rehearing he has shown that the summary judgment rendered herein in favor of the shipowner and against the petitioner is contrary to law, justice and equity. The rule of law applied herein is wrong and should be overturned.

> It must not be; there is no power in
> Venice
> Can alter a decree established;
> 'Twill be recorded for a precedent;
> And many an error by this same
> example
> Will rush into the state. (i)

WHEREFORE, for the reasons set forth above and in the Petition for Writ of Certiorari, it is respectfully urged that rehearing be granted and that the Court withdraw its order of May 15, 1967, refusing the Petition for Writ of Certiorari herein, and that the Court issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

CHARLES R. MALONEY,
816 Richards Building
New Orleans, Louisiana 70112

Attorney for Will Foster,
Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

Charles R. Maloney

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing Petition for Rehearing on Mr. James Schupp of Messrs. Terriberry, Rault, Carroll & Yancey, by mailing a copy of the same to his office at the International Trade Mart Building.

Dated: July____, 1967.

Charles R. Maloney

FOOTNOTES

(a) "He who decides a case without hearing the other side, though he decides it justly, cannot be considered just." Seneca, Medea CXCIX

(b) "Justice renders to every one his due." Cicero, De Legibus, I, 10

(c) A cargo plan or a loading/discharging procedure by its design can design an accident just the same as driving or operating a vehicle or vessel in the fog.

(d) Gonzales was the aggressive seaman who inflicted injury upon Boudoin in the Boudoin v. Lykes Bros. SS case.

(e) "No one can with safety expose himself often to dangers. The man who has often escaped is last caught." Seneca, Hercules Furens, 325

(f) "Extreme justice is extreme injustice." Cicero, De Officiis, I, 10

(g) The opinion of the Fifth Circuit in the instant case made no reference to any applicable U. S. Supreme Court decision.

(h) The printed opinion of the Court in the Robichaux case indicates what appears to be an erroneous citation: _____. F

2d _____(5-Cir 1956)

(i) Merchant of Venice, Act IV, Sc 1, L 218.